

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

<b>CHARLES M. WENZEL</b>	)	
Claimant	)	
VS.	)	
	)	Docket No. 206,322
<b>WENZEL CONSTRUCTION, INC.</b>	)	
Respondent	)	
AND	)	
	)	
<b>UNITED STATES FIDELITY &amp; GUARANTY</b>	)	
Insurance Carrier	)	

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<b>CHARLES M. WENZEL</b>	)	
Claimant	)	
VS.	)	
	)	Docket No. 220,964
<b>WENZEL CONSTRUCTION, INC.</b>	)	
Respondent	)	
AND	)	
	)	
<b>KANSAS BUILDING INDUSTRY WORKERS COMPENSATION FUND</b>	)	
Insurance Carrier	)	

**ORDER**

Respondent and Kansas Building Industry Workers Compensation Fund appealed the November 9, 1999 Award entered by Administrative Law Judge Bruce E. Moore. The Appeals Board heard oral argument on April 5, 2000.

**APPEARANCE**

Dale V. Slape of Wichita, Kansas, appeared for the claimant. Ronald J. Laskowski of Topeka, Kansas, appeared for the respondent and United States Fidelity & Guaranty (USF&G), one of its insurance carriers. Kendall Cunningham of Wichita, Kansas, appeared for respondent and its subsequent insurance carrier, Kansas Building Industry Workers Compensation Fund (KBIWCF).

**RECORD AND STIPULATIONS**

The record considered by the Appeals Board and the parties' stipulations are listed in the Award.

**ISSUES**

Claimant sustained a specific accident on March 22, 1995, when the machine he was on rolled over. Claimant was thrown to the ground, fracturing both feet and injuring his back. Thereafter, claimant suffered additional repetitive trauma injuries to his low back at work and aggravations due to his altered gait. Docket No. 206,322 is a request for review and modification of the January 31, 1997 Agreed Award involving a claim for injuries to both feet and back from a series of accidents commencing March 22, 1995, and continuing each and every working day thereafter. Docket No. 220,964 is a claim for continuing injuries/aggravations to claimant's low back beginning July 5, 1995, when he returned to work, until claimant's employment with the respondent ended on March 13, 1998. These two claims were consolidated for hearing purposes.

Judge Moore found that claimant's additional injuries were the result of a new series of accidents and that claimant was therefore entitled to permanent partial disability benefits in Docket No. 220,964 rather than modification of the award in Docket No. 206,322.

Regarding the claim in Docket No. 220,964 for an aggravation to the back, the Judge found a March 13, 1998 date of accident, the last date claimant worked before leaving work due to his injury.<sup>1</sup> Finding claimant had not made a good faith job search effort during the time period before March 10, 1999, the Judge imputed a wage of \$206 per week. Beginning March 10, 1999, the Judge utilized the claimant's actual earnings. Averaging the claimant's 100 percent wage loss with the 83 percent task loss, he arrived at a 91.5 percent work disability. After deducting 8 percent for preexisting impairment, the Judge awarded claimant an 83.5 percent permanent partial general disability.

The KBIWCF, respondent's subsequent insurance carrier, argues the Judge erred in finding a new series of accidents because claimant failed to prove that he sustained either additional permanent injury or permanent worsening of the impairment to his back during its period of coverage.

The KBIWCF contends Judge Moore not only erred by finding that claimant sustained a series of accidents to the back from and after July 5, 1995 through the last day of work on March 13, 1998, but also in awarding claimant a work disability in Docket No. 220,964.

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<sup>1</sup> See Treaster v. Dillon Companies, Inc., 267 Kan. 610, 987 P.2d 325 (1999).

The claimant and USF&G, respondent's other insurance carrier, contend that the ALJ's award against KBIWCF should be affirmed, although USF&G also suggests the work disability should be less.

The issues before the Appeals Board on this appeal are:

1. What is the appropriate date or dates of accident for claimant's alleged injuries?
2. What is the nature and extent of claimant's injury and disability?

In its Application for Review by the Workers Compensation Board, KBIWCF raised an issue concerning its entitlement to a K.S.A. 44-510a credit, but this issue was abandoned during oral argument to the Board.

Also during oral argument the parties agreed that if claimant is entitled to receive permanent partial general disability benefits in Docket No. 220,964, the 8 percent utilized by the ALJ is the appropriate reduction for preexisting impairment under K.S.A. 44-510(c).

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the entire record, the Appeals Board agrees with and adopts the ALJ's findings and conclusions set forth in the Award except as follows:

The Board agrees with the ALJ that the opinion by respondent's vocational expert, Karen Terrill, concerning claimant's post-accident wage earning ability is somewhat speculative and probably unrealistic. Given his knowledge and experience, however, claimant should be able to earn more than minimum wage. The Board therefore finds claimant has the ability to earn \$300 per week, as opined by claimant's vocational expert, Jerry Hardin. The Appeals Board further finds claimant made a good faith effort to find work during the period he was drawing unemployment benefits, from March 13, 1998 through October 1998. However, beginning November 1998 when claimant found out his wife was being transferred out of state, claimant stopped looking for work. A weekly wage of \$300 should be imputed for the period beginning November 1, 1998 until March 10, 1999. Thereafter, claimant resumed his job search and is entitled to a wage based upon his actual wage.<sup>2</sup>

#### **AWARD**

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<sup>2</sup> Copeland v. Johnson Group, Inc., 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

**WHEREFORE**, the Appeals Board affirms the November 9, 1999 Award as to Docket No. 206,322. Claimant's application for review and modification of the Agreed Award entered January 31, 1997, is denied.

**WHEREFORE**, the Appeals Board modifies the November 9, 1999 Award as to Docket No. 220,964 as follows:

Charles M. Wenzel is granted compensation from Wenzel Construction, Inc., and its insurance carrier, Kansas Building Industry Workers Compensation Fund, for a March 13, 1998 accident. Mr. Wenzel is granted an 83.5% permanent partial disability for the period from March 14, 1998 to October 31, 1998, or 33.14 weeks compensation at the rate of \$334.36 per week totaling \$11,080.69. For the period from November 1, 1998 through March 9, 1999, Mr. Wenzel is granted a 53.5% permanent partial disability, or 18.43 weeks at the rate of \$334.36 per week totaling \$6,162.25. For the period beginning March 10, 1999, Mr. Wenzel is granted an 83.5% permanent partial disability making a total award not to exceed the maximum of \$100,000.00.

As of April 30, 2000, Mr. Wenzel is owed 111.28 weeks of compensation at the rate of \$334.36 per week totaling \$37,207.58, which is ordered paid in one lump sum less any amounts previously paid. The balance of \$62,792.42 is to be paid at the rate of \$334.36 per week until paid in full.

The Board adopts the remaining orders set forth in the Award to the extent they are not inconsistent with the above.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of April 2000.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Dale V. Slape, Wichita, KS  
Ronald J. Laskowski, Topeka, KS  
Kendall Cunningham, Wichita, KS

Bruce E. Moore, Administrative Law Judge  
Philip S. Harness, Director